Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 02-278
	)	
Petitions for Declaratory Ruling and	)	CG Docket No. 05-338
Retroactive Waiver of 47 C.F.R.	)	
§ 64.1200(a)(4)(iv) Regarding the Commission's	)	
Opt-Out Notice Requirement for Faxes Sent with	)	
The Recipient's Prior Express Permission	)	

APPLICATION FOR FULL COMMISSION REVIEW

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APPLICATION FOR FULL COMMISSION REVIEW

INTRODUCTION

Pursuant to 47 C.F.R. § 1.115, Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye MD PC (collectively, "Applicants") hereby request full Federal Communications Commission ("Commission") review of the August 28, 2015 Order issued by the Acting Chief, Consumer and Governmental Affairs Bureau (the "Bureau") of the Commission in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, DA 15-976 (Aug. 28, 2015) (the "Supplemental Waiver Ruling"). The Supplemental Waiver Ruling indiscriminately granted all 117 waiver requests filed with the Commission for retroactive waivers of the opt-out notice requirements imposed by 47 C.F.F. § 64.1200(a)(4)(iv) (the "Opt-Out Regulation") on fax ads sent to recipients who purportedly consented to receive them.

This deluge of waiver requests resulted from the full Commission's prior October 30, 2014 Order, which reaffirmed the Commission's authority to issue the Opt-Out Regulation, but granted 25 previously filed waiver requests and invited additional similarly situated parties to file waiver requests no later than April 30, 2015. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of* 2005, CG Docket Nos. 02-278 & 5-338, DA 14-164 (Oct. 30, 2014) (the "Waiver Ruling"). Although the Commission's Waiver Ruling admonished that "all future waiver requests will be adjudicated on a case-by-case basis and [that it would] not prejudge the outcome of future waiver requests," the Acting Chief's Supplemental Waiver Ruling granted all 117 waiver requests in one fell swoop, acting in excess of the Bureau's authority and without consideration of any individual facts (or lack thereof) underlying those requests.

As demonstrated below, the Commission should review and reverse the Bureau's Supplemental Waiver Ruling because the Ruling (i) "conflict[s] with statute, regulation, case precedent, [and] established Commission policy"; (ii) "involves a question of law [and] policy which has not previously been resolved by the Commission"; (iii) "involves application of a precedent or policy which should be overturned or revised"; and (iv) makes "an erroneous finding as to an important or material question of fact." 47 C.F.R. § 1.115.

APPLICANTS' STANDING TO SEEK FULL COMMISSION REVIEW

Because, as described in the section that follows, all three Applicants are plaintiffs in pending TCPA litigations in which they have asserted claims for violation of the Opt-Out Regulation against parties to whom the Bureau has just granted retroactive waivers of those violations, Applicants are "aggrieved" persons who have standing pursuant to 47 C.F.R. § 1.115 to seek full Commission review of the Supplemental Waiver Ruling. Consistent with their being

aggrieved parties, all three Applicants participated in the Commission proceedings that resulted in the Supplemental Waiver Ruling: on December 15, 2014, Applicants Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye, MD PC filed a consolidated opposition to the November 12 and 13, 2014 waiver petitions filed by ACT, Inc., Amicus Mediation and Arbitration Group, and Hillary Earle.[1] *Bais Yaakov et al. Corrected Comments on ACT, Inc.'s, Amicus Mediation and Arbitration Group, Inc.'s and Hillary Earle's Petitions Seeking "Retroactive Waiver" of the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission*, CG Docket Nos. 02-278 & 05-338 (Dec. 15, 2014) (the "Response to ACT/Amicus Petition"); *see also Supplemental Waiver Ruling*, ¶ 1 n.2.

SUMMARY OF PRIOR PROCEEDINGS

A. Commission Proceedings

Over the course of several years, a variety of parties filed 25 petitions challenging the FCC's authority to issue the Opt-Out Regulation and, in the alternative, seeking retroactive waivers of the Opt-Out Regulation's application to them. The openly admitted objective of those parties was to thwart various plaintiffs in then pending litigations from prevailing on claims against them for violation of the Opt-Out Regulation, which constitutes a violation of the TCPA itself. 47 U.S.C. § 227(b)(3). Applicants filed three sets of comments, on February 13, April 11 and August 8, 2014, urging the Commission to reconfirm its authority to issue the Opt-Out Regulation and to deny those parties' waiver requests.

[1] Appendix A of the Supplemental Waiver Ruling erroneously fails to include Roger H. Kaye and Roger H. Kaye, MD PC as participants in these proceedings. As stated above, on December 15, 2014 those two parties filed consolidated Comments with the Commission (the Response to ACT/Amicus Petition) in opposition to two of the waiver requests the Bureau has granted in the Supplemental Waiver Ruling.

On October 30, 2014, the Commission issued its Waiver Ruling, reconfirming its authority to issue the Opt-Out Regulation, but granting the waiver requests then before it – and thereby purported to retroactively and prospectively waive almost nine years of violations of the Opt-Out Regulation, from its August 6, 2006 effective date through April 30, 2015, for those who had sought waivers. *Waiver Ruling*, ¶¶ 1-3. In support of its grant of waivers, the Commission found that a notice of proposed rulemaking it had issued back in 2005 (the "NPRM") and a footnote in its 2006 implementing order issuing the final Opt-Out Regulation (the "Implementing Order") "led to confusion or misplaced confidence on the part of petitioners," and that this "confusion or misplaced confidence" justified a waiver of the Regulation. *Id.*, ¶ 26.

The Commission's Waiver Ruling also invited others to file additional waiver requests until April 30, 2015: "Other, similarly situated parties may also seek waivers such as those granted in this Order. . . . We expect parties making similar waiver requests to file within six months of the release of this Order." *Waiver Ruling*, ¶¶ 30, 2. The Commission explicitly stated, however, that "all future waiver requests will be adjudicated on a case-by-case basis," and that it was "not prejudg[ing] the outcome of future waiver requests in this Order." *Id.*, ¶ 30, n.102.

An avalanche of 117 additional waiver requests followed. *See Supplemental Waiver Ruling*, ¶ 1 & n.2 (listing requests). The Acting Chief of the Consumer and Governmental Affairs Bureau chose to grant all 117 of those waiver requests – including several filed in May and June, 2015, after the Commission's April 30, 2015 deadline for filing additional requests, without providing any reason for excusing the tardiness of those request (other than to observe that they cover fax ads sent up to April 30, 2015). *Supplemental Waiver Ruling*, ¶¶ 11, 20.

Although the Bureau recited the two basic elements of "special circumstances" and "public interest" required for obtaining a waiver of Commission rules articulated in *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 & n.9 (D.C. Cir. 1969), the Bureau decided that none of those requesting waivers was required, under the Commission's prior Waiver Ruling, to come forward with "specific, detailed grounds for individual confusion." *Id.*, ¶¶ 14, 19. Instead, the Bureau ruled that those requesting waivers could simply cite to the NPRM and footnote 154 of the Implementing Order as evidence of "confusion" and hence special circumstances – irrespective of whether they even were aware of those two items, much less confused by them. *Supplemental Waiver Ruling*, ¶¶ 14, 15, 16. The Bureau found that those two items warranted a "presumption of confusion," and that those *opposing* the waivers bore the burden of rebutting that presumption. *Id.*, ¶¶ 15, 16, 19.

The Bureau went on to reject the individual counter-proof offered by those opposing the waivers that many fax advertisers were not in fact confused about the existence of the Opt-Out Regulation because they chose to include opt-out notices in all their fax ads (that turned out to lack required information), accepting the waiver applicants' dubious arguments that including those opt-out notices simply "was a matter of good business practice rather than knowledge of the rule." *Supplemental Waiver Ruling*, ¶ 18. Finally, the Bureau ruled that waivers were in the public interest, but did not cite any facts to support that finding. *Supplemental Waiver Ruling*, ¶¶ 13, 14, 16, 19.

B. Bais Yaakov of Spring Valley v. ACT, Inc.

In the meantime, on July 30, 2012 Applicant Bais Yaakov of Spring Valley ("Bais Yaakov") had filed a private TCPA class action in the United States District Court for the

District of Massachusetts against Petitioner ACT, Inc.[2] Bais Yaakov has alleged, among other things, that from July 30, 2008 through July 30, 2012, ACT sent thousands of permission-based fax advertisements to Bais Yaakov and others that lacked proper opt-out notices, which violated the Opt-Out Regulation, and hence the TCPA. *See Response to ACT/Amicus Petition*, p. 2. That litigation is currently stayed in the Massachusetts District Court, but may be resuming shortly. *Id.*

Not once in the Massachusetts District Court has ACT argued that it was confused about whether the Opt-Out Regulation applies to permission-based fax ads because of either the NPRM or footnote 154 of the Implementing Order. *Response to ACT/Amicus Petition*, p. 3. Indeed, not once has ACT even asserted that it was even aware of the NPRM, the Implementing Order, or the Opt-Out Regulation itself. *Id.*, pp. 3-4. In point of fact, the one ACT witness who testified about the matter at his deposition specifically stated that he was not even aware of the existence of the TCPA until Bais Yaakov had filed its complaint against ACT. *Id.*, p. 3 & exh. A thereto, pp. 85-86.

Despite the fact that the ACT litigation had been filed long before the Commission issued its October 30, 2014 Waiver Ruling, ACT did not request any waiver from the Commission until after the Commission had issued that Ruling. Then, jumping on the bandwagon, ACT filed a cursory, six-page petition with the Commission on November 12, 2014, requesting a retroactive waiver. *Petition for Waiver of ACT, Inc.*, CG Docket Nos. 02-278, 05-338 (Nov. 12, 2014) (the "ACT Petition"). As in the District Court, ACT did not contend that it was confused either by the NPRM or the Implementing Order, and admitted that the Opt-Out Regulation "requires *solicited* fax advertisements to include the same opt-out notice as *unsolicited* fax

[2] *See Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12-CV-40088-TSH (D. Mass.).

advertisements." *ACT Petition*, p. 1. Bais Yaakov filed an opposition to ACT's petition on December 15, 2014. *Response to ACT/Amicus Petition.* Without identifying any facts relating to ACT individually, the Bureau granted ACT's request for a waiver in its Supplemental Waiver Ruling. *Supplemental Waiver Ruling*, ¶ 24.

C. Kaye et al. v. Amicus Mediation & Arbitration Group, Inc., et al.

Also in the meantime, on March 14, 2013 Applicants Roger H. Kaye and Roger H. Kaye, MD PC had filed a private TCPA class action in the United States District Court for the District of Connecticut against Amicus Mediation & Arbitration Group, Inc. and Hillary Earle.[3] The two Kaye plaintiffs have alleged, among other things, that from March 14, 2009 through March 9, 2013, the two related Amicus defendants sent thousands of permission-based fax advertisements to the plaintiffs and others without proper opt-out notices in violation of the Opt-Out Regulation, and hence the TCPA. *See Response to ACT/Amicus Petition*, p. 4. After the parties conducted extensive discovery, the Connecticut District Court issued a published decision on May 28, 2014 certifying two of the Kaye plaintiffs' proposed classes. *Kaye v. Amicus Mediation & Arbitration Group, Inc.,* 300 F.R.D. 67 (D. Conn. 2014). The case has since been effectively stayed pending judicial appeals of the Waiver Ruling. *See Response to ACT/Amicus Petition*, p. 4.

In a deposition in the litigation, the Amicus defendants testified that they were not even aware of the TCPA (much less the NPRM or Implementing Order) until after the litigation was filed against them. *See Response to ACT/Amicus Petition*, p. 5 & exh. B thereto, p. 67. It necessarily follows from this complete lack of awareness of the existence of the TCPA that the Amicus defendants could not have been confused by the NPRM or Implementing Order relating to the TCPA when they sent the fax ads covered by the pleadings in the Amicus litigation.

[3] *See Roger H. Kaye, et al. v. Amicus Mediation and Arbitration Group, Inc., et al.*, Case No. 3:13-CV-347-JCH (D. Conn.).

Just like the case in the ACT litigation, despite the fact that the Amicus litigation had been filed long before the Commission issued its October 30, 2014 Waiver Ruling, the Amicus defendants did not request any waiver from the Commission until after the Commission had issued its Waiver Ruling.[4] Just two weeks later, on November 13, 2014, the Amicus defendants filed a request for a waiver, disingenuously arguing, for the first time, that they were confused about the applicability of the Opt-Out Regulation because of the NPRM and footnote 154 in the Implementing Order. *Petition for Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278 & 05-338 (Nov. 13, 2014) (the "Amicus Petition"), p. 5; *see also Response to ACT/Amicus Petition*, p. 4. The Amicus defendants also argued, without citing any supporting evidence, that granting them a retroactive waiver of the applicability of the Opt-Out Regulation would be in the public interest because the Amicus Petitioners' failure to abide by the opt-out regulation "would potentially subject Amicus to millions of dollars in damages under the TCPA," an amount that would allegedly cause it to go out of business. *Amicus Petition*, p. 5.

The two Kaye Applicants filed their comments in opposition to the Amicus defendants' request for a waiver on December 15, 2014. *Response to ACT/Amicus Petition.* Without identifying any facts relating to the Amicus defendants individually, the Bureau granted their request for a waiver in its Supplemental Waiver Ruling. *Supplemental Waiver Ruling*, ¶ 24.

[4] In fact, the Connecticut district court refused to grant the Amicus defendants' request for a stay of the litigation pending the Commission's determination of the then pending waiver petitions because the Amicus defendants had not themselves bothered to file any waiver petition at the time. *Roger H. Kaye, et al. v. Amicus Mediation and Arbitration Group, Inc., et al.*, Case No. 3:13-CV-347-JCH (D. Conn.), Docket No. 87 (May 27, 2014), p. 1 ("Several factors weigh against staying this case. First, defendants have long been aware of the issues on which clarification from the FCC is sought. Second, they have not filed an administrative petition.").

ARGUMENT

I. THE BUREAU'S SUPPLEMENTAL WAIVER RULING SHOULD BE REVERSED BECAUSE THE COMMISSION LACKS AUTHORITY TO RETROACTIVELY WAIVE PRE-EXISTING STATUTORY CAUSES OF ACTION FOR VIOLATION OF THE OPT-OUT REGULATION

The Bureau based its Supplemental Waiver Ruling on its understanding that the Commission has the power to retroactively waive statutorily created causes of action under the TCPA. It does not.

The TCPA's private right of action based on violation of the Commission's regulations is authorized in the TCPA – a statute enacted by Congress. *See* 47 U.S.C. § 227(b)(3)(A) & (B). That section of the TCPA does not provide the Commission with any authority to waive or otherwise impair a private cause of action that arises under it.

Moreover, none of the TCPA's other provisions that do delegate authority to the Commission gives the Commission any right to impair that congressionally created private right of action. 47 U.S.C. § 227(b)(2)(B)-(G). Nor can the Commission claim any implied delegation of such authority. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction'"). Nor can the Bureau find any authority for impairing that private right of action in 47 C.F.R. § 1.3, which generally enables the Commission to waive the requirements of a *regulation*, but not a cause of action already accrued under a *statute* for violation of a regulation. *E.g., National Ass'n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009) ("the Commission has authority

under its rules, *see* 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest. . . .").[5]

Where, as is the case with the TCPA, a statute creates a private right of action and does not give an agency any authority to impair it, the Courts have been vigilant about preventing an agency from overstepping its authority. *E.g., Natural Resources Defense Council v. E.P.A.*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (EPA lacked authority to create affirmative defense to private right of action established by Clean Air Act); *Adams Fruit, supra*, 494 U.S. at 649-50. The Bureau's Supplemental Waiver Ruling violates this well settled precedent because the Bureau lacked any authority to impair the private right of action asserted by scores of plaintiffs against the parties whose waiver requests the Bureau has granted.

As a result, the Bureau's Supplemental Waiver Ruling conflicts with the TCPA, the regulations thereunder, and the caselaw construing it; and applies a policy of indiscriminately granting waivers that should be overturned.

II. 1 U.S.C. § 109 ALSO PRECLUDES CONGRESS AND THE COMMISSION FROM RETROACTIVELY EXTINGUISHING LIABILITIES CREATED UNDER THE TCPA'S PRIVATE RIGHT OF ACTION IN THE ABSENCE OF EXPRESS AUTHORITY TO DO SO

1 U.S.C. § 109 provides in pertinent part that the repeal of any statute does not retroactively extinguish liabilities previously accrued under the statute unless the statute expressly, or by plain import, provides for such extinguishment. Accordingly, if Congress had desired to allow itself or the Commission to retroactively extinguish private causes of action

[5] Nor is the Bureau's effort to cast its ruling as simply an "interpretation" of the TCPA entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). *E.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994) (because agency's regulation required higher standard of proof than statute to collect benefits, regulation was not entitled to *Chevron* deference and was invalidated: "the text and reasonable inferences from the statute give a clear answer against the Government 'agency's regulation]") (citations omitted).

created by the TCPA, Congress would have had to do so explicitly in the TCPA. *E.g.*, *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 372-73 (D.C. Cir. 1998) (claim for compensation for injury incurred before repeal of workers' compensation law should be decided under repealed law because new workers' compensation law did not retroactively extinguish such liability under old statute, as required by 1 U.S.C. § 109).

Because Congress did not explicitly state that the private right of action under the TCPA for violation of the Commission's regulations could be retroactively repealed by Congress, much less that that private right of action could be abrogated by an administrative agency such as the Commission, the Bureau's attempt to extinguish private plaintiffs' right of action to pursue TCPA claims for past violations of the Opt-Out Regulation conflicts with 1 U.S.C. § 109 and the caselaw construing it; and applies a policy of indiscriminately granting waivers of liability that should be overturned.

III. THE BUREAU'S SUPPLEMENTAL WAIVER RULING VIOLATES TWO SEPARATION OF POWERS PRINCIPLES

The Bureau summarily rejected Applicants' contention that any ruling purporting to retroactively waive preexisting private parties' liability for TCPA claims asserted in pending litigations violates separation of powers principles. The Bureau reasoned that it was simply "interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency," and further that it has "authority, as the expert agency, to define the scope of when and how our rules apply." *Supplemental Waiver Ruling,* ¶ 13. That reasoning is specious.

The Bureau's blanket issuance of retroactive waivers does not just "interpret" a statute, but effectively nullifies a statute creating a private right of action. Moreover, issuing retroactive waivers is not just "defining the scope of when and how our rules apply," but instead is attempting to retroactively constrict the scope of a private right of action which the Bureau lacks

any authority to constrict. Accordingly, the Bureau's wholesale grant of 117 waivers of statutory private rights of action asserted in pending litigation plainly implicates separation of powers concerns.

Not only is the Bureau's Supplemental Waiver Ruling subject to separation of powers scrutiny, but it violates two separation of powers dividing lines: between the Commission and Congress, and between the Commission and the Judiciary. First, by issuing a Supplemental Waiver Ruling that purports to categorically extinguish preexisting liability incurred by the parties who filed the 117 waiver petitions, the Bureau has intruded into Congress's power to enact and repeal legislation creating private rights of action. *E.g., Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them.").

Second, because the Bureau's Supplemental Waiver Ruling impairs TCPA claims that Applicants and others already have asserted in pending judicial proceedings throughout the United States, that Ruling intrudes upon the province of the Judiciary. *Adams Fruit, supra*, 494 U.S. at 650 (rejecting Secretary of Labor's position limiting liability under statute "because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicatory of private rights of action arising under the statute").[6]

Accordingly, the Supplemental Waiver Ruling conflicts with constitutional separation of

[6] *See also City of Arlington, Texas v. F.C.C*, 133 S. Ct. 1863, 1871 n.3 (2013) (reaffirming that "*Adams Fruit* stands for the modest proposition that the judiciary, not any executive agency, determines 'the scope' — including the available remedies — 'of judicial power vested by' statutes establishing private rights of action.").

powers principles and the caselaw construing them; and applies a policy of granting waivers of pre-existing liability that should be overturned.

IV. THE BUREAU ISSUED A LEGISLATIVE RULE THAT LACKS THE CONGRESSIONAL AUTHORIZATION REQUIRED TO BE APPLIED RETROACTIVELY

As a matter of administrative law, the Supplemental Waiver Ruling is the equivalent of a "legislative rule" that repeals an existing rule, notwithstanding the Bureau's assertion that it had considered each of the 117 waiver requests individually. That is because, first of all, the only support the Bureau cited for its Ruling are two "legislative facts" – the NPRM and the Implementing Order – which the Bureau found to cause "confusion" warranting blanket waivers. Those facts are legislative because they apply equally to everyone, not to specific parties in a specific factual context. Consistent with the legislative nature of its ruling, the Bureau did not cite any individual evidence from any parties requesting a waiver as to why that waiver applicant is entitled to a waiver. Indeed, the Bureau did not even see any need to address whether any of the parties requesting waivers were even aware of the NPRM or Implementing Order, much less relied on those items. *Supplemental Waiver Ruling*, ¶ 19.

Further, the Supplemental Waiver Ruling granted each and every one of the 117 waiver requests made to it, after seeking comment from the public on those requests. Indeed, among the 117 waiver requests granted in the Bureau's Supplemental Waiver Ruling were several that had been filed after the April 30, 2015 deadline for filing requests the Commission had set in its original Waiver Ruling. These circumstances further confirm that the Supplemental Waiver Ruling is effectively a retroactive legislative repeal of the Opt-Out Regulation.

Because the Supplemental Waiver Ruling is a legislative rule, it may not be applied retroactively to impair any "vested rights," such as causes of action, under the U.S. Supreme

Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("a statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms"); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

Accordingly, by purporting to apply retroactively to impair existing causes of action, the Supplemental Waiver Ruling conflicts with administrative law statutes and caselaw construing legislative rules; and applies a policy of indiscriminately granting waivers of liability that should be overturned.

V. EVEN IF THE SUPPLEMENTAL WAIVER RULING WERE DEEMED AN ADJUDICATORY RULE, IT CANNOT BE APPLIED RETROACTIVELY BECAUSE IT DOES NOT SATISFY THE *RETAIL, WHOLESALE* TEST

Even if the Bureau's sweeping and indiscriminate ruling could alternatively be considered an adjudicatory rule, it would also be improper because it does not satisfy the requirements for retroactive applications of adjudicatory rules. As the D.C. Circuit held in *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972):

> "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. . . ."
> . . . .
>
> Among the considerations that enter into the resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

See also Williams Natural Gas Co. v. F.E.R.C., 3 F.3d 1544, 1554 (D.C. Cir. 1993) (citations omitted) (where an adjudicatory rule "substitu[tes] new law for old law that was reasonable

clear. . . . it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.").

The Supplemental Waiver Ruling constitutes a "case of first impression" because the Bureau has, after nine-plus years of having the Opt-Out Regulation on the books, deemed that the Opt-Out Regulation has effectively been a nullity for those nine years. For the same reason, the Bureau's Ruling represents "an abrupt departure from well established practice." In addition, the parties "against whom the new rule is applied" – Applicants and the scores of other plaintiffs in TCPA litigations who have asserted claims against those seeking waivers in the 117 waiver petitions – have plainly "relied on the former rule" by pursuing litigation claims based on that former rule. Further, because Applicants and others have spent years extensively litigating those TCPA claims in complex litigation, the "degree of burden" the Supplemental Waiver Ruling has imposed upon them, by undermining important claims in those cases, is unquestionably severe. Finally, the "statutory interest in applying a new rule" – in this case the abrogation of an existing rule – is nonexistent. To the contrary, the Bureau's Ruling discourages private parties from enforcing the TCPA and increases the burden on the Commission to police junk fax advertising.

Accordingly, even if the Bureau's Supplemental Waiver Ruling were deemed to announce an adjudicatory rule, it fails to satisfy each and every one of the five factors in the *Retail, Wholesale* test, and thus cannot apply retroactively as the Bureau intends. As a result, the Supplemental Waiver Ruling conflicts with administrative law statutes and caselaw construing adjudicative rules; and applies a policy of indiscriminately granting waivers of liability that should be overturned.

VI. THE BUREAU FAILED TO ARTICULATE AN APPROPRIATE STANDARD AND TO MAKE THE INDIVIDUAL FACTUAL FINDINGS REQUIRED TO ISSUE ANY TYPE OF WAIVER OF A COMMISSION RULE

The Commission's rules generally provide that "[a]ny provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. To demonstrate good cause, a person requesting a waiver of a Commission rule "must plead with particularity the facts and circumstances which warrant" a waiver instead of making "generalized pleas." *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 & n.9 (D.C. Cir. 1969). The person requesting a waiver must "adduce concrete support, preferably documentary," of "special circumstances" warranting a waiver. *Id.*; *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008).

To grant a waiver, the Commission must first "articulate a relevant standard" it is following. *WAIT Radio, supra*, 418 F.2d at 1159. Second, the Commission must make a specific finding of "special circumstances." *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). And third, the Commission must find that the waiver "will serve the public interest." *Id.*

Nowhere in the Supplemental Waiver Ruling has the Bureau articulated a "relevant standard" for determining when it will and when, if ever, if will not grant a waiver. Indeed, by the Bureau's reasoning, which is based only on the existence of the NPRM and Implementing Order, and not on any facts pertaining to any individual party requesting a waiver, the Bureau has set itself up to grant waivers to each and every party that has asked for one, without regard to any relevant standard.

Nor has the Bureau made any individualized findings of "special circumstances." Nor could it because the parties requesting waivers have not provided the Bureau with any specific

facts upon which to make such findings. Instead, the Bureau simply concluded that the existence of the NPRM and footnote 154 of the Implementing Order, by themselves, create a "presumption" of confusion about the existence and nature of the Opt-Out Regulation that constitutes special circumstances for the purpose of all 117 waiver requests. However, those two legislative "facts," by themselves, are woefully insufficient to demonstrate special circumstances for numerous reasons.

First, no party has shown that it actually read, much less relied on, the NPRM or footnote 154 of the Implementing Order in coming to the conclusion that no regulation requires that opt-out notices appear on permission-based fax ads. Second, and more to the ultimate issue, no party has shown, and the Bureau has refused to consider, that it actually was confused about the existence and nature of the Opt-Out Regulation. Third, no party could credibly show that it actually was confused about the nature of the Opt-Out Regulation because the Regulation itself requires, in abundantly clear text, that fax ads sent to recipients who have agreed to receive them "must include an opt-out notice . . . ." 47 C.F.R. § 64.1200(a)(4)(iv); *Nack v. Walburg*, 715 F.3d 680, 683 (ruling that the Opt-Out Regulation, "read most naturally and according to its plain language, extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements"), *cert. denied*, 134 S. Ct. 1539 (2014).

Fourth, the actual evidence presented to the Bureau supports a finding that no one was confused because many parties have acknowledged that they used the same opt-out notice on all their unsolicited and permission-based fax ads. While the Bureau accepted one party's argument that it did so solely as a matter of "good business practice," that dubious self-serving argument is undercut by the fact that the party allegedly included opt-out notices that do not comply with the TCPA in all its fax ads, which is a decidedly bad business practice. Fifth, by ruling that the

NPRM and Implementing Order create a "presumption" of confusion, and requiring that the parties opposing waivers come forward with evidence rebutting such a presumption, *see Supplemental Waiver Ruling,* ¶¶ 15, 16, 18, 19, the Bureau improperly watered down the waiver petitioners' proof requirements articulated in *WAIT Radio*, which mandate that a party *seeking* a waiver – not the party opposing a waiver – satisfy a "high hurdle even at the starting gate' and submit individualized "concrete support" to support the waiver. 418 F.2d at 1157 & n.9.

Finally, the Bureau concluded that granting all 117 requests for waivers is in the public interest, *see Supplemental Waiver Ruling,* ¶ 13, but did not cite any evidence to support that conclusion. Instead, the Bureau stated that just because some requesting waivers did "not face significant potential liability for violations of the opt-out notice requirement," that fact did not mean that granting waivers is not in the public interest. *Supplemental Waiver Ruling*, ¶¶ 19, 13, 14, 16. Needless to say, this vacuous negative "finding" does not establish that granting waivers *is* in the public interest. Nor, even for those who contended that the public interest requires that they be shielded from ruinous liability, is there any underlying factual proof in the record to show such consequences if they are held liable for violating the TCPA, as *WAIT Radio* requires. Moreover, the Bureau failed even to give lip service to the other side of the coin regarding the public interest in enforcing the Opt-Out Regulation – that the TCPA itself requires that it be enforced for the benefit of persons who receive millions of unwanted fax ads from those who are seeking waivers; that persons who receive purportedly permission-based fax ads should be instructed on how to follow the specific steps that the TCPA requires for opting out of receiving future unwanted fax ads; and that fax advertisers may erroneously or fraudulently contend that they have received permission to send fax ads to persons who do not want to receive them.

At the end of the day, the Bureau abdicated its obligation to individually analyze the 117

requests for waivers before it by simply concluding that those waiver petitioners are "similarly situated" to the initial set of parties that obtained waivers from the Commission in its Waiver Ruling, based only on the (1) inconsistency between [an Implementing Order] footnote and the rule, and (2) the [NPRM] provided prior to the rule did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." *Supplemental Waiver Ruling*, ¶ 14. This "similarly situated" finding is no substitute for the individualized factual evidence and findings required by *WAIT Radio* and its progeny for granting a waiver.

As a result, the Commission's finding that all 117 waiver petitions should be granted conflicts with 47 C.F.R. § 1.3 and the caselaw precedent of *WAIT Radio* and its progeny, involves application of a policy of making wholesale grants of waivers that should be overturned, and makes several erroneous findings as to important and material questions of fact regarding whether special circumstances exist to support grants of those waivers, and whether the public interest supports those grants of waivers.

RELIEF REQUESTED

For all the foregoing reasons, the Commission should (a) review the Bureau's grant of the 117 of the waiver petitions addressed in the Supplemental Waiver Ruling, and (b) reverse by denying all 117 of those waiver petitions.

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Respectfully submitted,

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